IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~769~~ 70-13

BUFORD ELLINGTON, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; JOE C. CARR, Secretary of State of the State of Tennessee; SHIRLEY G. HASSLER, Coordinator of Elections of the State of Tennessee; GEORGE C. THOMAS, Chairman of the State Board of Elections of the State of Tennessee; LYTLE LANDERS and JAMES E. HARPSTER, Members of the State Board of Elections of the State of Tennessee; THOMAS W. JARRELL, Chairman of Davidson County Election Commission; ALBERT H. THOMAS, IMOGENE MUSE, J. GRANSTAFF DALE, and JOHN H. HENDERSON, Members of the Davidson County Board of Elections; and MARY P. FERRELL, Registrar-at-Large, of Davidson County, State of Tennessee,
Appellants,

vs.

JAMES F. BLUMSTEIN,
Appellee.

On Appeal from the Three Judge United States District Court for the Middle District of Tennessee, Nashville Division

JURISDICTIONAL STATEMENT

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Appellants,

vs.

JAMES F. BLUMSTEIN,

Appellee.

On Appeal from the Three Judge United States District Court for the Middle District of Tennessee, Nashville Division

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Three Judge United States District Court for the Middle District of Tennessee, Nashville Division, entered on September 9, 1970, striking down the constitutional and statutory provisions in Tennessee for residency requirement for voting; and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is as yet unreported. Copies of the opinion, findings of fact, conclusions of law and judgment, and order implementing the same, are attached hereto as Appendix "A".

JURISDICTION

This suit was brought under 28 United States Code, Section 2201, seeking declaratory judgment, and for injunctive relief pursuant to 28 U. S. C., Section 2202, 42 U. S. C., Section 1893 and 28 U. S. C., Section 1343. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1253, for direct appeal from Three Judge District Courts, pursuant to 28 U. S. C., Sections 2281 and 2282.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State constitutional and statutory provisions, which the United States District Court struck down as being void and violative of the 14th Amendment of the United States Constitution, are as follows:

Article IV, Section 1, Tennessee Constitution:

"**Right to vote—Election precincts—Military Duty.**—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this State shall be subject to the performance of military duty, as may be prescribed by law. [As Amended: Adopted in Convention May 25, 1953; Approved at election November 3, 1953; Proclaimed by Governor November 19, 1953.]"

And,

Section 2-201, Tennessee Code Annotated:

"**Qualifications of voters.**—Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this State for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside. [Acts 1870, ch. 40, § 1; 1873, ch. 1, § 1; Shan., § 1167; mod. by U. S. Const., Amend. 19; Code 1932, § 1937; Acts 1957, ch. 22, § 1.]"

And, further,

Section 2-304, Tennessee Code Annotated:

"**Persons entitled to permanently register—Required time for registration to be in effect prior to Election.**—All persons qualified to vote under existing laws at the date of application for registration, including those who will arrive at the legal voting age by the date of the next succeeding primary or general election established by statute following the date of their application to register (those who become of legal voting age before the date of a general election shall

be entitled to register and vote in a legal primary election selecting nominees for such general election), who will have lived in the state for twelve (12) months and in the county for which they applied for registration for three (3) months by the date of the next succeeding election shall be entitled to permanently register as voters under the provisions of this chapter, provided, however, that registration or re-registration shall not be permitted within thirty (30) days of any primary or general election provided for by statute. If a registered voter in any county shall have changed his residence to another county, or to another ward, precinct or district within the same county, or changed his name by marriage or otherwise, within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration. [Acts 1951, ch. 75, § 4 (Williams, § 1996.32); 1957, ch. 22, § 2; 1959; ch. 74; § 1; 1951, ch. 108, § 1; 1961, ch. 167, § 1; 1965, ch. 288, § 1; 1967, ch. 266, § 1.]"

QUESTIONS PRESENTED

I

Whether Article IV, Section 1, of the Tennessee State Constitution, which requires twelve (12) months residency in the State and three months residency in the County prerequisite to voting, is repugnant to the constitution of the United States and, therefore, null, void and of no effect.

II

Whether Sections 2-201 and 2-203, of Tennessee code annotated, which implements Article IV, Section 1, of the Tennessee State Constitution, so as to impose a twelve

(12) months in-state and three (3) months in-county durational residency requirement for voting, is repugnant to the Constitution of the United States, and, therefore, null, void and of no effect.

III

Whether or not the "Compelling State Interest" doctrine has supplanted the "irrational or unreasonable" doctrine in prescribing durational residency requirements for voting, to the extent that no durational residency requirements may be imposed by States on voters.

STATEMENT OF THE CASE

On July 17, 1970, James F. Blumstein, Plaintiff below and Appellee herein, brought suit in his own behalf, and on behalf of all others similarly situated, for declaratory judgment and supplemental injunctive relief. The suit attacked the three months in-county and twelve months in-state durational residency requirement on voting and voter registration, contained in Article IV, Section 1, of the Tennessee State Constitution, as implemented in Sections 2-201 and 2-304, Tennessee Code Annotated. The suit alleged that such was repugnant to the United States Constitution.

On August 31, 1970, an order was entered by the Three Judge District Court, permitting Plaintiff to maintain his suit as a class action, and rendering an opinion in the case. Prior to the entering of the opinion, a hearing had been held before the District Court, on a request for a temporary injunction to permit the Plaintiff to cast his vote in the August 6, 1970 primary and general elections. The District Court refused to issue the temporary injunction and also denied a motion that the Plaintiff be allowed to cast a sealed provisional ballot for such election.

At the time of this hearing, July 30, 1970, it was agreed that it would be unnecessary to take evidence in the matter and that such would be submitted to the Court on brief and argument. On August 31, 1970, the opinion was rendered, granting the Plaintiff the relief prayed for, striking down the constitutional and statutory provisions in Tennessee. The order implementing this decision was entered on September 9, 1970.

In the aforementioned order when the constitutional and statutory provisions complained of were striken, the Defendants (Appellants herein) were ordered to cause the election registrars in all counties of Tennessee to register all bona fide residents of the state of Tennessee, regardless of the length of their prior period of residence either in the State of Tennessee or in the county in which they seek to register; and that no inquiry be made concerning duration of prior residence so as to prejudice those seeking to register under such order. The order further required Defendants to cause to be published daily through October 3, 1970, in both the morning and afternoon newspapers of Memphis, Knoxville, Nashville and Chattanooga, notice of such order, informing the members of the aggrieved class of their right to register and of the willingness of the registrars to so register them. It was further ordered that registrars be open to such class, through October 3, 1970 (thiry (30) days prior to the November 3, 1970, general election), on Monday through Friday from 9:00 a. m. to 4:00 p. m., and on Saturdays from 9:00 a. m. to 2:00 p. m., except in certain smaller counties in which registrars were required to remain open only two days a week, one of which was to be Saturday, until the last day that registration is to be opened under the registration laws of Tennessee.

A Stay Order was applied for with the District Court, on September 10, 1970, which was denied September 11,

1970. On September 14, 1970, the Defendants (Appellants herein) filed notice of appeal to this Court. On September 16, 1970, after filing notice of appeal, Appellants herein filed an Application for Stay of Mandate with Associate Justice Potter Stewart, Circuit Justice for the Sixth Circuit. Action on this motion has not been taken at the time of the preparation of this Jurisdictional Statement, however, due to the exigency of the situation, and since the granting or denying of the Stay Order would not be determinative of the question, Appellants have proceeded with the perfection of this appeal, wishing to do so regardless of whether or not the Stay Order is granted.

THE QUESTIONS ARE SUBSTANTIAL.

The action of the Three Judge District Court, in striking down all residency requirements for voting, is an unprecedented decision, in conflict with all previous opinions of the United States Supreme Court in upholding the validity of the state to impose reasonable requirements on the availability of the ballot, including that of durational residency requirements. The last case decided by this Honorable Court, directly on point, passing on a state durational residency requirement for voting which was substantially identical to those requirements in Tennessee, was **Druedling v. Devlin**, 234 Fed. Sup. 721 (D. C., Md. '64), Affirmed per curiam 380 U. S. 125 ('65). This Court has recognized such requirements in later cases, including that of **Kramer v. Union Free School Dist.**, 395 U. S. 621 (1969), 89 S. Ct. 1886.

Appellants insist that it is a substantial question any time a United States District Court renders a decision in direct conflict with the United States Supreme Court decisions existing at such time. The United States District Court, in taking such drastic action in opposition to former Supreme

Court holdings, did so as a result of what it found to be an evolutionary trend in this country to replace the "irrational or unreasonable" test for the constitutionality of voting rights as enunciated in the previous cited opinions and numerous other opinions of the United States Supreme Court, has been superseded by the "compelling state interest" test mentioned by Congress in Subsection 6 of the 1970 amendments to the Voting Rights Act. That part of the 1970 Voting Rights Act, relied upon by the District Court, is that which would remove (if found to have been constitutionally enacted) residency requirements for voting in presidential elections. Appellants insist that the District Court's reasoning breaks down at this point. The District Court, in its opinion (footnote 2, page 10) concluded that the reason for the rejection by Congress of the abolition of residency requirements for voting in state elections, at the time it approved such in presidential elections, was because it anticipated a favorable holding by this Honorable Court, in a case then pending before it from Colorado, styled **Hall v. Beals**, 396 U. S. 45 (1969). The absence of logic in this conclusion is apparent since, had Congress anticipated such action in the aforementioned case, there would have been no need to pass the presidential election amendment since, had the appellants in Hall v. Beals prevailed, there would have been no residency requirements in any election.

Appellants further would insist that even if the "compelling interest" doctrine is substituted for the "irrational or unreasonable" "compelling interest" doctrine, that such still should not completely abolish the right of the state to impose any residency requirements for voting. The Constitution surrounded the right of suffrage with some inconveniences and authorized the Legislature to attach more. Such inconveniences, when uniformly applied, in no wise infracts the 14th Amendment of the Constitution of the United States. Article 4, Section 4 of that instru-

ment guarantees to every state in the Union a republican form of government. No government can be republican that fails to secure the purity of elections. By these terms of the United States Constitution, the Legislature of each state has the organic authority for the passage of such laws as will secure that purity, and it cannot be urged that such laws abridge the privileges or immunity of the citizens. In the matter of voting, the only privilege one has is to cast his ballot fairly and not interfere with others by fraud, force or duress. His privileges are personal.

Certainly it cannot be said that it is not a "compelling state interest" to:

1) insure the purity of the ballot box through proper legislation, by protection against fraud through colonization and inability to identify persons offering to vote, and

2) afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently. **18 Am. Jur.**, Elections, p. 217.

These long recognized purposes of residency requirements are valid equally under the "compelling state interest" doctrine and the "irrational or unreasonable" doctrine. It might well be that these purposes can be achieved under requirements of shorter duration than that imposed by the State of Tennessee, as well as the majority of the other states of the Union, under present constitutional and statutory provisions and laws.

The District Court held that the only constitutionally permissible purpose of durational residency requirements is to secure the freedom and purity of the ballot boxes in the various counties of the state, and preventing plural voting, and by requiring electors to vote in the precincts in which they reside. This language is pulled, by the

Court, from Section 2-301, Tennessee Code Annotated. Such holding completely ignores the above mentioned, time-proven and accepted purposes for imposing durational residency requirements. The District Court further held that this section of the Tennessee Code Annotated is the only one in Tennessee law dealing specifically with protection of the "compelling state interest" doctrine it holds to be controlling.

In a recent opinion of a Three Judge District Court in Massachusetts, in the case of **Burg v. Caniffe et al.**, opinion dated July 8, 1970, that Court struck down the six months residency within the state requirement then existing, but permitted to stand the six months requirement in the district. That Court also based its decision on the "compelling state interest" doctrine, but recognized that some residency requirements are valid even under that doctrine, holding that there was nothing before the Court to show that the second six months served a "compelling state interest," but stating no opinion as to whether any other durational residency requirement short of twelve (12) months might be found to serve a compelling state interest. Stated differently, it acknowledges the need but admits that it cannot draw a line and justify it, but simply rejects the line drawn by the state constitution and the Massachusetts legislative body.

In drawing the line, so far as the time of residency is concerned, either under "compelling state interest" doctrine or "irrational or unreasonable" doctrine, this Honorable Court, in **Kramer v. Union Free School District**, supra, said:

> "Clearly a state may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally informed re-

garding state affairs than are non-residents, will be more likely than non-residents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and of literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn can not infallibly perform their intended legislative function. Just as illiterate people may be intelligent voters, non-residents or minors may also in some instances, be interested, informed and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the state in which they are employed; some college students under twenty-one may be both better informed and more passionately interested in political affairs than many adults, but such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. **So long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy and age requirements imposed with respect to voting—there is no denial of equal protection.**" (Emphasis supplied.)

In summary, Appellants say:

Article I, Section 2, and the Seventeenth Amendment of the United States Constitution, makes voter qualifications rest on state law, even in Federal elections, **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801; and residency is a qualification properly required for both State and Federal suffrage, **Forssenius v. Harman**, 235 Fed. Sup. 66, Affirmed 85 S. Ct. 1177; and the several states may impose age, residence and other requirements on the right to vote in a state or federal election, so long as such requirements do not discriminate against any class of citizens by reason of race, color or other invidious ground, and so long as

such requirements are not so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, **Dreuding v. Devlin**, supra.

Other recent United States Supreme Court cases upholding the right of the states to impose reasonable citizenship, age and residency requirements on the availability of a ballot are **Carrington v. Rush**, 85 S. Ct. 775, and, perhaps the most recent one, **Kramer v. Union Free School District**, supra.

There are, of course, exceptions to the restrictions a state may place upon the right to vote. Race, color or previous condition of servitude is an impermissible standard, by means of the Fifteenth Amendment of the United States Constitution, **Goimillion v. Lightfoot**, 81 S. Ct. 125. Sex is another impermissbile standard, by reason of the Nineteenth Amendment to the United States Constitution.

In **Baker v. Carr**, 82 S. Ct. 691, again in the concurring opinion of Mr. Justice Douglas, it is said that a third barrier to a state's freedom in prescribing qualifications of voters, is the Equal Protection Clause of the Fourteenth Amendment. Discussing this, Justice Douglas said:

> "The traditional test under the Equal Protection Clause has been whether a state has made an 'invidious discrimination' as it does when it selects a 'particular race or nationality for oppressive treatment.'" See **Skinner v. Oklahoma**, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655. "**Universal equality is not the test; there is room for weighing.** As we stated in **Williamson v. Lee Optical Co.**, 348 U. S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'" (Emphasis supplied.)

Our Supreme Court held, in **Baker v. Carr**, supra, that the cause was justicible as being "matters of state governmental organization."

Nowhere is it even implied, in this lengthy discussion, both of Article I, Section 2, coupled with the Seventeenth Amendment, and of Article IV, Section 4, that state residence requirements placed on voters universally would violate the Equal Protection Clause of the Constitution. In the concurring opinion of Mr. Justice Stewart, in **Baker v. Carr**, supra, it is said:

> "In case after case arising under the Equal Protection Clause the Court has said what it said again only last term that 'the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' **McGowan v. Maryland**, 366 U. S. 420, 425, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' **Metropolitan Casualty Ins. Co. v. Brownell**, 294 U. S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1070."

Justice Stewart went on to say that the **Baker** decision did not turn back on these settled precedents.

CONCLUSION

It is submitted that the decision of the District Court fails to recognize the authority of states to provide residency requirements as a prerequisite to voting, under the authority granted to them by their own constitution and laws and by the Constitution of the United States of America. Further, the District Court has failed to recognize as controlling on them the past decisions of this Honorable Court dealing with this question.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted

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Certificate of Service

I, Robert H. Roberts, Assistant Attorney General of the State of Tennessee, one of the attorneys for the Appellants herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served copy of the within Jurisdictional Statement to the Appellee herein, Mr. James F. Blumstein, by mailing same to him, by first class postage paid mail, in duly addressed envelope, to the School of Law, Vanderbilt University, 21st Avenue, South, Nashville, Tennessee 37203, this 21st day of September, 1970.

Robert H. Roberts
Assistant Attorney General
State of Tennessee

-14-

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted

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Certificate of Service

I, Robert H. Roberts, Assistant Attorney General of the State of Tennessee, one of the Attorneys for the Appellants herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served copy of the within Jurisdictional Statement on the Appellee herein, Mr. James F. Blumstein, by mailing same to him, first class postage paid and fully addressed envelope, to the School of Law, Vanderbilt University, 21st Avenue South, Nashville, Tennessee 37203, this 21st day of September, 1970.

Robert H. Roberts
Assistant Attorney General
State of Tennessee

APPENDIX "A"

In the United States District Court for
the Middle District of Tennessee
Nashville Division

James F. Blumstein

v.

Buford Ellington, Governor of the State of Tennessee; David Pack, Attorney General of the State of Tennessee; Joe C. Carr, Secretary of State of the State of Tennessee; Shirley G. Hassler, Coordinator of Elections of the State of Tennessee; George C. Thomas, Chairman of the State Board of Elections of the State of Tennessee; Lytle Landers and James E. Harpster, Members of the State Board of Elections of the State of Tennessee; Thomas W. Jarrell, Chairman of the Davidson County Election Commission; J. Granstaff Dale, John H. Henderson, Imogene Muse and Albert H. Thomas, Members of the Davidson County Board of Elections; Mary P. Ferrell, Registrar-at-Large of Davidson County, State of Tennessee

Civil Action
No. 5815

Before: Harry Phillips, Circuit Judge, Bailey Brown, and Frank Gray, Jr., District Judges.

Gray, District Judge. This is an action for a declaratory judgment and supplementary injunctive relief, pursuant to 28 U. S. C., §§ 2201 and 2202, in which plaintiff,

in his own behalf and on behalf of all others similarly situated, attacks the three-month and one year durational residency requirements on voting and voter registration contained in Article IV, Section 1 of the Tennessee Constitution and its statutory implementations in the Tennessee Code Annotated as repugnant to the Constitution of the United States of America. A three-judge court, required by 28 U. S. C., § 2281, has been convened under the provisions of 28 U. S. C., § 2284.

Plaintiff moved to Tennessee on June 12, 1970, and established his home in Nashville. He is under contract of employment as assistant professor of law at Vanderbilt Law School, and, consequently, intends to remain in Nashville indefinitely. He is thus a *bona fide* resident of the State of Tennessee, and this is undisputed.

On July 1, 1970, plaintiff appeared at the office of the Registrar-at-large of Davidson County, where he attempted to register to vote. He was informed that, in order to qualify for registration, he had to have been a resident of Davidson County for the three-month period next preceding the forthcoming election (to be held August 6, 1970) and a resident of the State of Tennessee for the one year period next preceding that election. Accordingly, his attempt to register was refused.

Pursuant to T. C. A., § 2-319, plaintiff appealed the decision of the Registrar-at-large to the Davidson County Election Commission. At his appearance before the Election Commission, he was informed that the durational residency requirements were mandatory and that no exceptions could be made in his, or any other, case. Having thus exhausted his state statutory administrative remedies, he brought this action.

In his original complaint, plaintiff ignored the fact that the durational residency requirements herein under consideration are contained not only in T. C. A., § 2-201, but

also in the Tennessee Constitution. He has therefore amended his complaint so that the validity of both the constitutional and the statutory provisions is placed at issue in this case. It also appears that the Tennessee durational residency requirements apply to voter registration, as well as to actual voting, by virtue of T. C. A., § 2-304. We hereby take judicial notice of that fact, and the remainder of this opinion is thus addressed to the following issue: Whether the one year and three-month durational residency requirements contained in Article IV, Section 1 of the Tennessee Constitution, in T. C. A., § 2-201, and in T. C. A., § 2-304 are repugnant to the Constitution of the United States.

We are faced at the outset by the problem of whether this is a proper case in which to consider the validity of the three-month requirement. The August 6, 1970, primary and general elections have already been held, and plaintiff will have met the three-month requirement by the time of the November general election. As indicated above, plaintiff originally desired to vote in the August elections, and, to do so, he requested that this court issue a temporary injunction which would have had the effect of opening the Davidson County voter registration rolls to him and to all others similarly situated so that they could participate.

The temporary injunction was refused by this court on the ground that it would be "so obviously disruptive as to constitute an example of judicial improvidence."

Aware that he will have met the three-month requirement by the time of the November election, plaintiff next filed a motion to be allowed to cast a sealed provisional ballot in the August 6, 1970, primary and general elections, with the clerk of this court, thus keeping the three-month aspect of the case alive as to him, pending ultimate adjudication on the merits, and avoiding dismissal of that

issue as moot. This motion was denied also, on grounds essentially the same as those for our refusal to issue the temporary injunction.

Despite plaintiff's fears as to the possible mootness of the three-month requirement issue, we are of the opinion that "[n]one of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case," **Sibron v. New York**, 392 U. S. 40, 57 (1968), and that, indeed, the three-month issue has not been rendered moot by the passage of the August elections without plaintiff's having been allowed to participate therein.

Controlling authority for such a view is found in **Moore v. Ogilvie**, 394 U. S. 814 (1969)—a case identical, in principle, to the one at bar. There, as here, preliminary extraordinary relief was withheld because of the administrative difficulties which would have been entailed by its implementation. The election was then conducted, and, as a result, the defendants argued that the case had been rendered moot. The Supreme Court disagreed. Applying the test first enunciated in **Southern Pacific Terminal Co. v. Interstate Commerce Commission**, 219 U. S. 498 (1911), the Court held that "[t]he problem is . . . 'capable of repetition, yet evading review' [citation omitted], [and] [t]he need for its resolution thus reflects a continuing controversy in the federal-state area. . . ." **Moore**, *supra*, at 816.

That the Tennessee three-month residency requirement raises precisely such a problem—"capable of repetition, yet evading review"—is obvious from a cursory analysis of the factual situation which such a requirement creates. As stated by Mr. Justice Brennan, in his dissenting opinion in the case of **Hall v. Beals**, 396 U. S. 45, 50 (1969), with reference to the Colorado two-month residency requirement:

> "[T]he constitutional challenge to the . . . Colorado statute is peculiarly evasive of review. This is because ordinarily a person's standing to raise that question would not mature unless he had become a Colorado resident within two months prior to a[n] . . . election. Barring resort to extraordinary expedients, that interval is obviously too short for the exhaustion of state administrative remedies and the completion of a lawsuit. . . ."

This reasoning applies with equal force to the case at bar. Indeed, it applies with greater force, because of the fact that, unlike the **Hall** situation (discussed at greater length, *infra*), there has been no amendment to the Tennessee three-month provision taking the plaintiff out of the class aggrieved by it.

At first blush, the recent decision of the Supreme Court in **Hall**, *supra*, wherein an action challenging the validity of the Colorado durational residency requirement was held to be moot, might appear to have implications for the case at bar. Nevertheless, this court is of the opinion that the decision in that case is inapplicable to the instant situation.

In **Hall**, prior to the ultimate adjudication of the controversy, the statute called into question was amended by the Colorado Legislature. Thus, viewing ". . . the Colorado statute as it now stands, not as it once did . . .," the Supreme Court concluded that, unlike the plaintiff in the instant case, ". . . under the statute **as currently written**, the appellants could have voted in [the election in question] . . .," and therefore the case was no longer ". . . a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." **Hall**, *supra*, at 48 (emphasis added).

The Court noted that the election was over, that it was impossible to grant plaintiffs the relief they had prayed

for, and that they had, in fact, satisfied the residency requirement originally under attack. Nevertheless, the Court specifically noted that the case's mootness was "... **apart** from these considerations ..." (emphasis added). In short, the case was held to be moot not because the election had already been held, but rather because the statute under attack was no longer operative. Thus a ruling on the validity of the pre-amendment statute would, indeed, have been nothing more than an advisory opinion on an abstract proposition of law. The Court found it "... impossible to grant appellants the relief they sought in the District Court," because relief of any kind quite obviously cannot be granted against the operation of a nonexistent statute. The Tennessee requirement, quite unlike that of Colorado, remains in full force and effect, and thus the mootness holding in **Hall v. Beals**, as well as the rationale for that holding, is inapplicable to the case at bar.

The **Hall** Court also refused to consider plaintiffs' belated attack on the Colorado statute as amended. Although the Court stated that the "... amendatory action of the Colorado Legislature has surely operated to render this case moot," it is clear that the Court's refusal to consider the amended statute was actually based more on the question of plaintiffs' standing to challenge it than on the doctrine of mootness. The Court specifically noted that the amended statute did not affect either the plaintiffs' "... present interests, or their interests at the time this litigation was commenced," and that they had never been members of the class aggrieved by the amended statute. Very clearly, there is a vast difference between holding a case to be "moot" when it involves an attack upon a statute by a plaintiff who has never been affected by that statute in any fashion whatsoever and in holding a case to be "moot" when, as in the case at bar, the plaintiff has been directly affected by the statute under consideration

and has attacked its validity consistently, by means of every procedure available to him. Thus, given the factual situation in **Hall v. Beals**, the Supreme Court had no alternative but to hold as it did. But it is different here, and the considerations of mootness and standing raised in **Hall** do not apply.

The fact that the **Hall** rationale does not apply to the case at bar is graphically demonstrated in a case decided the same day as **Hall v. Beals**. That is the case of **Brockington v. Rhodes**, 396 U. S. 41 (1969), in which the Supreme Court also dismissed an attack upon a state election law for mootness. There, as in **Hall**, the statute in question had been amended before final adjudication of the controversy, and the election had already been held. The Court noted, however, that the plaintiff in that case, unlike those in **Hall**, was still aggrieved by the statute as amended. Consistent with our discussion of the inapplicability of **Hall** to the case at bar, *supra*, the Supreme Court in **Brockington** refused to hold that that case was mooted merely because of the statutory amendment and subsequent election. Rather, it based its holding of mootness squarely on the ground that plaintiff had ". . . sought **only** a writ of mandamus to compel the appellees to place his name on the ballot as a candidate for a particular office in a particular election . . .," **Brockington**, *supra*, at 43 (emphasis added), and that such relief was obviously impossible once the election had taken place. In fact, the Court indicated that relief might well have been forthcoming if plaintiff's prayers had been for broader measures: "He did not sue for himself and others similarly situated as independent **voters**, as he might have . . ., [and] [h]e did not seek a declaratory judgment, although that avenue too was open to him."

Since plaintiff herein has, in fact, brought a class action seeking a declaratory judgment, it is clear that, unlike

either **Hall** or **Brockington**, the relief he requests is still available. Thus neither of those cases constitute precedent which would warrant a refusal by this court to consider the three-month requirement whose constitutional validity this plantiff has challenged. Indeed, **Brockington** can only be read as supporting the view that plaintiff's attack upon this requirement has not been rendered moot by the fact that the August 6, 1970, elections have already been held.

This court is thus of the opinion that plaintiff's case is not moot as to the three-month requirement. Further, plaintiff is still a member of the class aggrieved and will remain so until September 12, 1970.[1] It follows that this is an appropriate case in which to consider the validity of the Tennessee three-month requirement, along with that State's one year requirement, and this court so holds.

Given, then, the fact that both the Tennessee one year and three-month requirements are properly before this court for consideration, it remains to determine the appropriate standard against which to test their constitutionality.

"It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . ." **Reynolds v. Sims**, 377 U. S. 533, 554 (1964). It is, how-

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[1] For this reason the court need not consider the question of whether plaintiff could still maintain suit to protect the rights of the class even if he were no longer a member of it. In this connection, **see generally** Griswold v. Connecticut, 381 U. S. 479 (1965); Flast v. Cohen, 392 U. S. 83 (1968); Sullivan v. Little Hunting Park, 396 U. S. 229 (1969); Walling v. Haile Gold Mines, 136 F. 2d 102 (4th Cir. 1943); Buckner v. County School Board, 332 F. 2d 452 (4th Cir. 1964); Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F. 2d 648 (4th Cir. 1967); Jenkins v. United Gas Corp., 400 F. 2d 28 (5th Cir. 1968); Estaban v. Central Mo. State College, 415 F. 2d 1077 (8th Cir. 1969).

ever, universally conceded that ". . . the States have the power to impose reasonable . . . requirements on the availability of the ballot," **Kramer v. Union Free School District**, 395 U. S. 621, 625 (1969), and for this reason "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . ." **Lassiter v. Northampton County Board of Elections**, 360 U. S. 45, 50 (1959). Thus, as recently as 1964, a state's durational residency requirement, which was substantially identical to those of Tennessee, was upheld as constitutionally valid, **Drueding v. Devlin**, 234 F. Supp. 721 (D. C. Md. 1964), affirmed per curiam, 380 U. S. 125 (1965), on the ground that such requirements are permissible, unless they are ". . . so unreasonable that they amount to an irrational or unreasonable discrimination" among otherwise qualified Voters. **Drueding**, *supra*, at 725.

Nevertheless, it has lately become apparent that the **Drueding** standard is no longer viable law. ". . . [H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. . . . [for the] right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." **Reynolds**, *supra*, at 555. For this reason, durational residency requirements are rapidly falling into greater and greater disfavor as an undue stricture on the "scope of the right of suffrage" of American citizens. Thus, while the legislative history of the Voting Rights Act Amendments of 1970 reveals that "[i]n the course of its deliberations the [House Judiciary] committee separately considered and rejected . . . an amendment establishing a uniform residency requirement for voting for President and Vice President of the United States" (U. S. Code Congressional and Administrative News, July 20, 1970, at 2155), state durational residency requirements on

voting for those two offices were officially abolished in the final version of that Act.[2]

Certain of the language employed by Congress in the 1970 Amendments is applicable to the case at bar and is worth quoting in the present context:

"Sec. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1 of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right

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[2] Part of the reason for the Committee's rejection of the proposal was that it anticipated a case then pending in the Supreme Court. That case, of course, was Hall v. Beals, *supra*, in which the Colorado durational residency requirement on voting in presidential elections was placed at issue. However, as mentioned at length above, by virtue of an amendment to the Colorado statutes, which shortened the period, the matter was held to have become moot as to the plaintiffs, and the case was dismissed for that reason. There is thus at present no definitive ruling by the Supreme Court on the validity of such requirements as those at issue in the case at bar. **But see** the dissenting opinions of Brennan, J., and Marshall, J., in Hall, *supra*, at 50 and 51, respectively, and Burg v. Canniffe, *infra*, in which a statutory three-judge court struck down a Massachusetts requirement.

to vote for such officers because of the way they might vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of Presidential elections."

The court feels that these findings reflect the current trend of the law. Moreover, it is obvious that the "irrational or unreasonable" test for the constitutionality of voting rights statutes enunciated in **Drueding**, *supra*, has been superseded by the "compelling state interest" test mentioned by Congress in subsection (6) of the 1970 Amendments, *supra*.

The evolution of this latter test need not be herein elaborated, for it is clear that, as said by the three-judge court in **Burg v. Canniffe**, ... F. Supp. ... (D. Mass. July 8, 1970), "[a]ny lingering doubts that the compelling interest test must be used in determining the validity of state voting statutes . . . [were] permanently put to rest by two decisions of the Supreme Court handed down . . . on June 15, 1970, in **Evans v. Cornman**, . . . and on June 23, 1970, in **City of Phoenix v. Kolodziejski**, ..."

In **Evans v. Cornman**, ... U. S. ..., 26 L. Ed. 2d 370, the Court said:

> "Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. . . . [Citations omitted.] And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."

It follows, then, that the validity of the Tennessee provisions herein in question must be judged according to

the "compelling state interest" standard. It remains to examine this standard in more detail and then to apply it to the Tennessee durational residency requirements.

"The 'compelling interest' doctrine has two branches. . . . [One] branch . . . requires that classifications [among citizens] based upon 'suspect' criteria be supported by a compelling [state] interest. . . ." **Shapiro v. Thompson**, 394 U. S. 618, 658 (1969) (Harlan, J., dissenting). Certain of the classifications which have in the past been held to be "suspect" include those based upon race, **Korematsu v. United States**, 323 U. S. 214 (1944), upon wealth, **Harper v. Virginia Board of Elections**, 383 U. S. 663 (1966), upon political allegiance, **Williams v. Rhodes**, 393 U. S. 23 (1968), and, since the holding in **Shapiro**, *supra*, those based upon interstate movement.

"The second branch of the 'compelling interest' principle is . . . that a statutory classification is subject to the 'compelling interest' test if the result of the classification may be to affect a 'fundamental right,' regardless of the basis of the classification." **Shapiro**, *supra*, at 660 (Harlan, J., dissenting). And it is now settled beyond doubt that the right to vote is just such a "fundamental right" —indeed, the most fundamental right of all:

> "'Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' [Citation omitted.] This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. . . . Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are **necessary to pro-**

mote a compelling state interest. . . ." **Kramer**, *supra*, 395 U. S. at 626, 627 (emphasis added).

In short, since there is no question (1) that the classification of *bona fide* residents on the basis of recent arrival in Tennessee, as made by the Tennessee durational residency requirements, is "suspect," and (2) that those requirements otherwise infringe upon one of the fundamental civil and political rights of the citizens of Tennessee—the right to vote—the Tennessee durational residency requirements must be held to be constitutionally invalid, unless they are shown to be necessary to promote a compelling state interest.[3]

Given, then, the test to be applied, it is our opinion that the Tennessee durational residency requirements fall short of meeting it. The only constitutionally permissible purpose of such requirements is ". . . to secure the freedom and purity of the ballot box in the various counties of the state by preventing plural voting and by requiring voters to vote in the election precincts in which they reside.

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[3] The three-month requirement affects not only recent arrivals from out of state, but also those who have recently changed their county of residence within Tennessee. Individuals in this latter category, however, are permitted to vote in their former counties of residence for ninety days after they have removed therefrom—provided they were properly registered to vote in such county—by virtue of T. C. A., § 2-304. This court need not consider, however, whether this classification, which forces certain Tennesseans to return to their former counties to vote, is one based upon "suspect" criteria, for it is clearly one affecting a "fundamental right" and, as such, comes within the "second branch" of the compelling interest test. Moreover, the three-month requirement raises the equal protection issue, over and above the "suspect" criteria and "fundamental right" rationales, when one compares its effect upon recent intrastate movers with its effect upon recent arrivals from out of state. Persons in the latter category are given no opportunity at all to vote in Tennessee, while those in the former may vote for ninety days in their former counties of residence. Thus, insofar as the right to vote in Tennessee is concerned, the State's three-month durational residency requirement is not applied equally to all persons who have moved into a given county within the three-month period next preceding an election.

. . . ." T. C. A., § 2-301. The question of whether such a purpose constitutes a "compelling state interest" need not be pursued in the present context, for, assuming that Tennessee's interest in promoting freedom and purity of the ballot box and preventing plural voting is a compelling one, it is clear that that State's durational residency requirements are in no wise "necessary" to promote such an interest. That such purposes are better served by the application of a system of voter registration than by durational residency requirements is amply demonstrated by the fact that the section of the Tennessee Code Annotated in which the foregoing quotation appears is entitled "Purpose of **voter registration system**" (emphasis added) and by the fact that this section is the only one in the Tennessee Code Annotated dealing specifically with protection of the "compelling state interest" which defendants assert is instead protected by the Tennessee durational residency requirements.

As is provided in the case of presidential elections by Voting Rights Act Amendments of 1970, *supra*, T. C. A., § 2-304 provides that ". . . registration or reregistration shall not be permitted within thirty (30) days of any primary or general election provided for by statute." This reflects the judgment of the Tennessee Legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting. It is clear that, in actuality, Tennessee's interest in these matters is protected by the thirty-day period, and not by that State's durational residency requirements. Neither the purpose of, nor the justification for, these latter requirements can be found in either the Tennessee Constitution or the Tennessee Code Annotated, and this court is of the opinion that they are not "necessary" to promote any "compelling state interest" and, indeed, serve no valid purpose.

Unquestionably, Tennessee may constitutionally require individuals to be *bona fide* residents before allowing them to vote in the State. Nevertheless, it is equally beyond question that if such persons ". . . are in fact residents, with the intention of making . . . [Tennessee] their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation," **Carrington v. Rash**, 380 U. S. 89, 94 (1965), and the fact that they may be recent arrivals from out of state confers no right upon that state arbitrarily to deny them the franchise.

Accordingly, it is the judgment of this court that the one year and three-month durational residency requirements contained in Article IV, Section 1 of the Tennessee Constitution, in T. C. A. § 2-201, and in T. C. A., § 2-304 are repugnant to the Constitution of the United States of America, and are therefore null, void, and of no effect.

An order to implement this decision and providing for appropriate injunctive relief will be submitted by counsel within ten (10) days.

United States District Court
Middle District of Tennessee
Nashville Division

James F. Blumstein,
Plaintiff,
v.
Buford Ellington, et al.,
Defendants.
Civil Action.
No. 5815.

ORDER

In accordance with the Opinion filed in this cause on August 31, 1970, it is Ordered:

1. That the one-year and three-month durational residency requirements contained in Article IV, Section 1 of the Tennessee Constitution, in T. C. A., § 2-201, and in T. C. A., § 2-304, are repugnant to the Constitution of the United States of America, and are therefore null, void, and of no effect.

2. That defendants cause the registrars in all counties of Tennessee to fully and completely register and give registration cards to all *bona fide* residents of the State of Tennessee, regardless of the length of their prior period of residence either in the State of Tennessee or in the county in which they seek to register; and that no inquiry be made concerning duration of prior residence so as to prejudice those seeking to register under this Order.

3. That defendants cause to be published daily through October 3, 1970, in both the morning and afternoon newspapers of Memphis, Nashville, Knoxville and Chattanooga, notice of this Order, informing the members of the aggrieved class of their right to register and of the willingness of the registrars to so register them; and take other reasonable measures to assure that members of the aggrieved class are aware of their rights under this Order.

4. That defendants cause the registrars of all counties of Tennessee to remain open from one day after the effective date of this Order through October 3, 1970 (30 days prior to the November 3, 1970, general election, as provided in T. C. A., § 2-304), Monday through Friday from 9:00 A. M. to 4:00 P. M., and Saturdays from 9:00 A. M. to 2:00 P. M., so that the registrars of all counties remain open on all Saturdays, commencing on September 12, 1970, and ending on and including October 3, 1970, as permitted by T. C. A., § 2-306, in order to provide a greater opportunity for members of the class to take advantage of this Order and to facilitate the handling of the increased number of new registrants, except that the

registrars in counties whose population according to the 1960 census is less than 28,000 need only remain open two days a week, one of which must be Saturday, during the weeks September 13, 1970 through September 19, 1970, and September 20, 1970, through September 26, 1970, and in addition remain open every day, Monday through Saturday, during the week September 27, 1970, through October 3, 1970, the same as the more populous counties.

5. That defendants Jarrell, Dale, Henderson, Muse, and Thomas, members of the Davidson County Election Commission, and defendant Ferrell, registrar-at-large of Davidson County, fully and completely register plaintiff as of July 1, 1970, and issue to him a registration card forthwith, without further application on his part.

6. That defendants reimburse plaintiff for all fees and costs incurred in the course of this litigation.

Dated: September 9, 1970.

Frank Gray, Jr.
For the Court

Approved for Entry:

James F. Blumstein
Counsel for Plaintiff

Rob Roberts
Thomas E. Fox
Counsel for Defendants

Dated: September 9, 1970.

Attest: A True Copy

Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: L. M. Edwards, D. C.